



DATE DOWNLOADED: Sat Apr 6 18:27:55 2024

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

Alysha Stein-Manes, Putting Every Student First: The State Constitutionality of Last-in, First-out Seniority Protections When Economic Layoffs Disproportionately Impact Poor and Minority Students, 23 B.U. PUB. INT. L.J. 389 (2014).

ALWD 7th ed.

Alysha Stein-Manes, Putting Every Student First: The State Constitutionality of Last-in, First-out Seniority Protections When Economic Layoffs Disproportionately Impact Poor and Minority Students, 23 B.U. Pub. Int. L.J. 389 (2014).

APA 7th ed.

Stein-Manes, Alysha. (2014). Putting every student first: the state constitutionality of last-in, first-out seniority protections when economic layoffs disproportionately impact poor and minority students. Boston University Public Interest Law Journal, 23(2), 389-424.

Chicago 17th ed.

Alysha Stein-Manes, "Putting Every Student First: The State Constitutionality of Last-in, First-out Seniority Protections When Economic Layoffs Disproportionately Impact Poor and Minority Students," Boston University Public Interest Law Journal 23, no. 2 (Summer 2014): 389-424

McGill Guide 9th ed.

Alysha Stein-Manes, "Putting Every Student First: The State Constitutionality of Last-in, First-out Seniority Protections When Economic Layoffs Disproportionately Impact Poor and Minority Students" (2014) 23:2 BU Pub Int LJ 389.

AGLC 4th ed.

Alysha Stein-Manes, 'Putting Every Student First: The State Constitutionality of Last-in, First-out Seniority Protections When Economic Layoffs Disproportionately Impact Poor and Minority Students' (2014) 23(2) Boston University Public Interest Law Journal 389

MLA 9th ed.

Stein-Manes, Alysha. "Putting Every Student First: The State Constitutionality of Last-in, First-out Seniority Protections When Economic Layoffs Disproportionately Impact Poor and Minority Students." Boston University Public Interest Law Journal, vol. 23, no. 2, Summer 2014, pp. 389-424. HeinOnline.

OSCOLA 4th ed.

Alysha Stein-Manes, 'Putting Every Student First: The State Constitutionality of Last-in, First-out Seniority Protections When Economic Layoffs Disproportionately Impact Poor and Minority Students' (2014) 23 BU Pub Int LJ 389

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

PUTTING EVERY STUDENT FIRST: THE STATE CONSTITUTIONALITY OF “LAST-IN, FIRST-OUT” SENIORITY PROTECTIONS WHEN ECONOMIC LAYOFFS DISPROPORTIONATELY IMPACT POOR AND MINORITY STUDENTS

ALYSHA STEIN-MANES*

I. INTRODUCTION	390
II. LEGAL BACKGROUND	393
A. <i>State and Federal Roles in Reforming Our Education System</i>	393
B. <i>The Right to Education</i>	395
1. Education Is Not a Fundamental Right Under the Federal Constitution	395
2. State Educational Rights and Judicial Interpretations ..	396
C. <i>Teacher Seniority Systems and “Last-In, First-Out” Protections</i>	399
1. How LIFO Operates	399
2. Experience Trumps Quality	402
D. <i>California’s Seniority System Today</i>	406
1. <i>Reed v. State of California, et al.</i>	407
2. <i>Vergara v. State of California</i>	410
E. <i>The Legislative Alternative: How Other States Use Legislation to Reform Teacher Seniority</i>	413
III. ARGUMENT	415
A. <i>California Must Utilize a More Rigorous Application of Section 44955(d)(2)</i>	416
B. <i>California and Other States Can Find a Middle Ground to Address the Disproportion Impact of Layoffs on Poor and Minority Students</i>	418
C. <i>Legal Action is California’s Best Short-Term Remedy in a Political Climate Where Legislative Reform Has Too Many Enemies</i>	420
IV. CONCLUSION	422

* J.D., Boston University School of Law, 2014.

I. INTRODUCTION

In February 2010, the American Civil Liberties Union (ACLU) and Public Counsel filed a class action lawsuit on behalf of students at three Los Angeles Unified School District (LAUSD) middle schools alleging that LAUSD's proposed layoff plan for the 2010 to 2011 school year violated the California Constitution and state statutes.¹ The Complaint alleged that, as a result of seniority protections afforded in California's Education Code and LAUSD's collective bargaining agreement with the local teachers' union, LAUSD's implementation of budget-based layoffs disproportionately impacts schools that serve high concentrations of low-income, high-minority students and English language learners.² While ACLU, Public Counsel, and California education reform advocates are not the first to address the need to reform teacher seniority systems, California is employing a nuanced tactic to address this particular issue: litigation.³

The education reform movement spans a range of issues: improving educational outcomes for students; recruiting quality teachers and administrators; evaluating teacher effectiveness; administering student testing; reforming teacher tenure; and reevaluating the teacher seniority system, to name a few. Many of these issues pit the rights and responsibilities of educators against those of students. Teacher seniority is one such topic.

Currently, strict teacher seniority statutes govern at least twelve states, with a majority of other states delegating the decision to conduct seniority-based layoffs to individual school districts.⁴ These regulations, popularly known as "Last-in, First-out" (LIFO) policies, dictate how school districts make layoff decisions in responding to budget shortfalls.⁵ As a result of LIFO, when school districts are forced to lay off their teachers, newer teachers, who are often concentrated in poor and minority communities, are the first teachers dismissed.⁶

¹ See generally Third Amended Complaint for Injunctive and Declaratory Relief, *Reed v. State*, 2011 WL 10893745 (Cal. Super. Ct. May 4, 2010) (No. BC432420), available at <http://www.aclu-sc.org/reed> [hereinafter Third Amended Complaint]. Public Counsel is a Los Angeles-based pro bono law firm specializing in impact litigation and policy advocacy. See PUBLIC COUNSEL, <http://www.publiccounsel.org/home> (last visited Mar. 7, 2014).

² See generally Third Amended Complaint, *supra* note 1.

³ Stephen Sawchuk, *Critics Ask Calif. Courts to Change Teacher Policies*, EDUC. WK., June 6, 2012, at 21.

⁴ *Save Great Teachers*, STUDENTS FIRST, <http://www.studentsfirst.org/lifo> (last visited Mar. 29, 2014) (providing a graphic showing states' risks of losing effective teachers due to LIFO statutes); see also MARY DOWELL ET AL., REFORM OF SENIORITY-BASED LAYOFF RULES FOR TEACHERS: A LEGAL ANALYSIS 3 (2011) (examining state laws and practices regarding seniority-based layoffs, with a particular emphasis on practices in California and Connecticut, and arguing that layoffs are "quality blind," thus disproportionately impacting poor and minority students).

⁵ DOWELL ET AL., *supra* note 4, at 1.

⁶ CARRIE HAHNEL & ORVILLE JACKSON, EDUC. TRUST-W., LEARNING DENIED: THE CASE FOR EQUITABLE ACCESS TO EFFECTIVE TEACHING IN CALIFORNIA'S LARGEST SCHOOL DIS-

LIFO policies thus have a disparate impact on poor and minority students, who all too often already fall at the low end of the achievement gap.⁷ In fact, one study found that, when schools base layoffs solely on seniority, the poorest schools see twenty-five percent more layoffs than the wealthiest schools.⁸ In Los Angeles, schools in some of the city's poorest communities were disproportionately impacted by layoffs, with "[n]early one in 10 teachers in South Los Angeles schools . . . laid off, nearly twice the rate in other areas. Sixteen schools lost at least a fourth of their teachers, all but one of them in South or Central Los Angeles."⁹

In addition to laying off a disproportionate number of teachers at lower performing and higher minority schools, the system also protects many less-talented teachers, while terminating a disproportionate number of high-quality teachers.¹⁰ Sampling approximately 22,000 teachers from LAUSD, one study found that that twenty percent of English and Language Arts (ELA) and math teachers who lost their jobs were in the top twenty-five percent of teacher performance rankings,¹¹ while twenty-seven percent were in the bottom quarter.¹² In fact, "nearly 2,000 ELA teachers and more than 1,500 math teachers in the lowest

TRICT 11 (2012), *available at* <http://studentsmatter.org/wp-content/uploads/2012/04/ETW-Learning-Denied-Report1.pdf>.

⁷ See generally *id.*

⁸ NEW TEACHER PROJECT, THE CASE AGAINST QUALITY-BLIND TEACHER LAYOFFS: WHY LAYOFF POLICIES THAT IGNORE TEACHER QUALITY NEED TO END NOW 7 (2011), *available at* http://tntp.org/assets/documents/TNTP_Case_Against_Quality_Blind_Layoffs_Feb2011F.pdf?files/TNTP_Case_Against_Quality_Blind_Layoffs_Feb2011F.pdf; see also SARAH ALMY & CHRISTINA THEOKAS, EDUC. TRUST, NOT PREPARED FOR CLASS: HIGH-POVERTY SCHOOLS CONTINUE TO HAVE FEWER IN-FIELD TEACHERS (2010), *available at* <http://www.edtrust.org/sites/edtrust.org/files/publications/files/Not%20Prepared%20for%20Class.pdf>; CHRISTINA SEPE & MARGUERITE ROZA, CTR. ON REINVENTING PUB. EDUC., THE DISPROPORTIONATE IMPACT OF SENIORITY-BASED LAYOFFS ON POOR, MINORITY STUDENTS (2010), *available at* http://www.crpe.org/sites/default/files/rr_crpe_layoffs_rr9_may10_0.pdf.

⁹ Jason Felch et al., *Grading the Teachers; Seniority over Quality*, L.A. TIMES, Dec. 5, 2010, at A1, A16.

¹⁰ First Amended Complaint at 17, *Vergara v. State*, 2013 WL 6912923 (Cal. Super. Ct. Aug., 12 2012) (No. BC484642), *available at* http://studentsmatter.org/wp-content/uploads/2012/05/SM_First-Amended-Complaint_08.15.12.pdf [hereinafter First Amended Complaint].

¹¹ HAHNEL & JACKSON, *supra* note 6, at 4. The study uses value-added scores to measure teacher performance, separating out "the role that non-school factors, including family background can play in student performance. Using three years of teacher data and six years of student data from the California Standards Test (CST) obtained from LAUSD," the model generates value-added scores from more than 12,000 English-language arts teachers in grades three through eleven and more than 10,000 math teachers in grades three through eight for the 2008, 2009, and 2010 school years. *Id.*

¹² *Id.* at 11.

quartile kept their jobs.”¹³

In states that deem education a “fundamental right” or guarantee students “equitable” or “adequate” education opportunities, inflexible applications of seniority provisions to determine layoffs violate the constitutional and statutory rights of students disproportionately harmed by resulting teacher turnover and school instability. In such instances, states should prioritize the rights of students over those of teachers.

This Note examines efforts to reform state seniority systems and layoff rules to ensure that students realize the equitable educational opportunities guaranteed to them, using impact litigation in California as its primary case study. Section I examines the relevant legal background behind seniority reform. Section II.A situates the debate in a federal context, explaining that, while the last ten to fifteen years have seen increased federal concern with reforming America’s education system, the issue of teacher seniority and staffing has largely remained under state control. Section II.B examines how courts have interpreted children’s right to education in the context of the Supreme Court’s holding that states are free define education rights as they see fit because the Constitution does not secure, as a fundamental right, any baseline quality of education.¹⁴ Many states, including California, deem the right to adequate and equitable educational opportunities a fundamental right of all citizens.¹⁵ As such, a finding of a disparity in educational opportunities may result in a state constitutional violation.¹⁶ Section II.C explains how school districts apply LIFO statutes to determine the order in which teachers are hired, transferred, and fired. It further examines how using LIFO-based policies to govern layoffs disparately diminish¹⁷ the quality of education states provide to poor and minority students.¹⁸ Because LIFO policies dictate that newer teachers are the first to receive pink slips, schools are staffed with a series of rotating substitutes, teachers who do not have the proper credentials, or teachers who simply do not want to teach such populations.¹⁹ Section II.D examines the California’s LIFO-based layoff system, with a focus on how layoffs affect LAUSD. As a result of the significantly high number and uneven distribution of layoffs in LAUSD and California, two class action lawsuits—*Reed v. State* and *Vergara v. State*—are currently pending in California’s courts to address the constitutionality of the

¹³ *Id.*

¹⁴ Although the cases cited pertain directly to school finance systems, as opposed to teacher seniority systems, because such claims were brought upon the grounds of disproportionate impacts of such systems on poor and/or minority students, the courts’ reasoning is equally applicable.

¹⁵ *Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1977).

¹⁶ *Butt v. State*, 842 P.2d 1240, 1249 (Cal. 1992).

¹⁷ *Serrano*, 487 P.2d at 1244 (recognizing a disparate impact standard for educational disparities).

¹⁸ HAHNEL & JACKSON, *supra* note 6, at 11.

¹⁹ Third Amended Complaint, *supra* note 1, at 16.

state's use of LIFO policies when making layoff decisions. This background material concludes in Section II.E, with an examination of how other states have addressed the shortfalls of LIFO statutes through legislative reform.

Section III argues that, because LIFO policies as currently applied in California and other states generate inadequate and inequitable educational opportunities for poor and minority students, states who deem education a fundamental right or mandate equitable or adequate educational opportunities fall short of fulfilling their responsibilities to resident children. Section III.A argues that California's school districts are ignoring the statutory authorization in California Education Code section 44955(d)(2), that allows school districts "skip" newer teachers when making layoff determinations in the event that firing such teachers would interfere with students' state constitutional rights.²⁰ The current system disparately harms educational opportunities and, in so doing, violates students' fundamental rights. Therefore, in order to remedy these violations the state and school districts must, at a minimum, employ section 44955(d)(2), to comply with state constitutional requirements. If districts continue to ignore section 44955(d)(2), however—which is very likely given California's political climate²¹—then California should cease to apply seniority as its sole means of determining layoffs, and its courts should hold such a strict application of seniority unconstitutional.

Section III.B provides alternatives to a "skipping" exception or a complete repeal of LIFO statutes: using legislation as a method to reform LIFO systems. Finally, Section III.C argues that the best route to reform in California is through the use of impact litigation, rather than repeal or amendment of LIFO statutes. This is because state and local teachers unions have shown an unwillingness to come to the table to negotiate the reform of LIFO and the layoff process. Section IV concludes by calling for open and productive dialogue among all stakeholders in the education arena—teachers, school districts, legislators, unions, parents, and students—as the first of many necessary steps to reform the current system into one that properly balances students' rights and teachers' needs.

II. LEGAL BACKGROUND

A. *State and Federal Roles in Reforming Our Education System*

The federal government is increasing its involvement in education reform

²⁰ CAL. EDUC. CODE § 44955(d)(2) (West 2011).

²¹ See Michael J. Mishak, *A Capitol Force*, L.A. TIMES, Aug. 19, 2012, at A1 (stating that the California Teacher's Association is one of the states most powerful lobbyist groups, spending more than \$200 million on political campaigns and lobbying expenses between 2000 and 2009); Darren Fishel, *Huff Bill Targeting Teacher Seniority Defeated*, ARCADIA PATCH (May 12, 2011, 2:47 PM), <http://arcadia.patch.com/groups/politics-and-elections/p/huff-bill-targeting-teacher-seniority-defeated-2> (reporting on the California Teacher Association's defeat of a teacher senior bill).

efforts.²² In 2001, the Bush Administration reauthorized the Elementary and Secondary Education Act (ESEA) as the No Child Left Behind Act (NCLB).²³ The enactment of the NCLB expanded “federal influence over educational decision making.”²⁴ The NCLB includes provisions regarding tracking of student achievement, accountability of schools and school districts, and sanctioning underperforming schools and school districts receiving federal education funding.²⁵ While the NCLB attempted to reform issues surrounding unions and collective bargaining, however, collective bargaining ultimately remained in local control.²⁶

The Obama Administration continues to assert federal influence over the education system.²⁷ Through the American Recovery and Reinvestment Act of 2009 (ARRA), the Administration encouraged states to reform their public school systems through competitive grant programs such as Race to the Top (RTTT) and the School Improvement Grant (SIG).²⁸ RTTT prioritized reforming teacher accountability measures and SIG required grant recipients to implement one of four reform models to revitalize low-performing schools.²⁹ The Administration based its blueprint for reforming the ESEA on ARRA programs, and outlined a plan for improving educational outcomes for American

²² See generally 20 U.S.C. § 6301 (2012) (calling for reforms which “ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education” through parent participation, teacher accountability, professional development and greater school and administrator autonomy); Education Jobs Fund, Pub. L. No. 111-226, § 101, 124 Stat. 2389 (2010) (allocating \$10,000,000,000 from the U.S. Treasury to be reserved for paying salaries and benefits, and rehiring, retaining or hiring employees for the school year. This was part of the Obama Administration’s economic recovery efforts); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (providing \$3,950,000,000 for training and employment services); U.S. DEP’T OF EDUC., A BLUEPRINT FOR REFORM: REAUTHORIZING THE ELEMENTARY AND SECONDARY EDUCATION ACT (2011) (outlining the Obama Administration’s goals in regards to “(1) Improving teacher and principal effectiveness to ensure that every classroom has a great teacher and every school has a great leader; (2) Providing information to families to help them evaluate and improve their children’s schools, and to educators to help them improve their students’ learning; (3) Implementing college- and career-ready standards and developing improved assessments aligned with those standards; and (4) Improving student learning and achievement in America’s lowest-performing schools by providing intensive support and effective interventions.”)

²³ 20 U.S.C. § 6301.

²⁴ DOWELL ET AL., *supra* note 4, at 5.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See generally Education Jobs Fund, Pub. L. No. 111-226, § 101, 124 Stat. 2389 (2010); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115. U.S. DEP’T. OF EDUC., *supra* note 22.

²⁸ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

²⁹ DOWELL ET AL., *supra* note 4, at 6.

students that raised U.S. competitiveness in the global education arena.³⁰

In the summer of 2010, Congress addressed the issue of preserving education-related jobs.³¹ In framing “Education Jobs” legislation, policymakers “considered whether the legislation should prohibit, as a condition of accepting federal funds, teacher layoffs from being conducted solely based on seniority,” with supporters contending that federal funds should preserve the jobs of the “most effective, not the most senior, teachers.”³² The Education Jobs Fund was passed absent this provision.³³

Although the past decade has seen the federal government increasingly try to assert its influence in the education arena, federal reform efforts also recognize that states and school districts have individual needs that a single formula cannot feasibly address.³⁴ Thus, meaningful education reform, as a practical matter, might vary widely across states and school districts.³⁵ One example of education reform adapting to its surrounding circumstances is in the arena of teacher seniority and the extent of its effect on hiring and layoff practices. In this arena, the federal government’s growing influence “has failed to result in any meaningful impact,” as evidenced by NCLB and the Education Jobs bill’s failed attempts to pass with clauses addressing seniority.³⁶ While it remains in the domain of state governments to promulgate and amend social legislation,³⁷ California remains unsuccessful at amending its seniority statute through the legislative process,³⁸ instead relying on impact litigation to stimulate reform.³⁹

B. *The Right to Education*

1. Education Is Not a Fundamental Right Under the Federal Constitution

The Supreme Court of the United States held in *San Antonio Independent School District v. Rodriguez* that education is not a fundamental right guaranteed by the United States Constitution.⁴⁰ The promulgation of social legislation,

³⁰ See U.S. DEP’T OF EDUC., *supra* note 22.

³¹ See Education Jobs Fund § 101.

³² DOWELL ET AL., *supra* note 4, at 6.

³³ *Id.*

³⁴ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (stating that social legislation is reserved for the states); U.S. DEP’T OF EDUC., *supra* note 22, at 3 (“States may choose to upgrade their existing standards or work together with other states to develop and adopt common, state-developed standards.”).

³⁵ *Rodriguez*, 411 U.S. at 37; see also U.S. DEP’T OF EDUC., *supra* note 22, at 3.

³⁶ DOWELL ET AL., *supra* note 4, at 6.

³⁷ *Rodriguez*, 411 U.S. at 35.

³⁸ John Fensterwald, *No Layoff Help for Troubled Schools*, THOUGHTS ON PUB. EDUC. (Sept. 1, 2010), <http://toped.svefoundation.org/2010/09/01/bill-to-shield-schools-from-lay-offs-defeated>.

³⁹ Third Amended Complaint, *supra* note 1, at 3.

⁴⁰ *Rodriguez*, 411 U.S. at 35. *Rodriguez* was a class action brought on behalf of school children “who were said to be members of poor families residing in school districts having

the Court concluded, is reserved for the states.⁴¹ As the Court explained, “at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”⁴² The existence of “some inequality” is insufficient to strike down an entire system.⁴³ That other methods exist which would result in “less drastic” inequalities is an insufficient reason to strike down a state or local system.⁴⁴ However, a less restrictive alternative must be employed “where state action impinges on the exercise of fundamental constitutional rights or liberties.”⁴⁵ Thus, under *Rodriguez*’s holding, it remains the responsibility of the states to deem education a fundamental right or provide other protections against education inequality.⁴⁶

2. State Educational Rights and Judicial Interpretations

Although *Rodriguez* held that education is not a fundamental right, states retain broad discretion to prescribe additional fundamental rights not protected under the U.S. Constitution.⁴⁷ The Supreme Court recognized that “education is perhaps the most important function of state and local governments.”⁴⁸ States define such rights through the promulgation of state constitutions and statutes.⁴⁹ A number of state constitutions and education codes contain clauses affording all pupils in the public school system “equitable,” “general and uniform,” or “thorough and efficient” educational opportunities, regardless of disability, gender, nationality, race, or ethnicity.⁵⁰

low property tax base.” *Id.* at 1. The plaintiffs challenged Texas’ reliance on a school financing system on local property taxation under the Equal Protection Clause of the Fourteenth Amendment, claiming that the “system’s reliance on local property taxation favors the more affluent and violates equal protection requirements because of substantial interdistrict disparities in per-public expenditures resulting primarily from differences in the value of assessable property among the districts.” *Id.* at 2.

⁴¹ *Id.* at 37.

⁴² *Id.* at 24.

⁴³ *Id.* at 51 (citing *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961)).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See id.*

⁴⁷ *See, e.g., id.* at 31 (citing *Shapiro v. Thompson*, 394 U.S. 618, 655 (1969)).

⁴⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁴⁹ *See e.g.,* ARK. CONST. art. 14, § 1 (2013); CAL. EDUC. CODE § 200 (West 2012); GA CONST. art. VIII, § 1, ¶ 1 (2013); N.J. CONST. art. VIII, § 4, ¶ 1 (West 2013).

⁵⁰ *See, e.g.,* ARK. CONST. art. 14, § 1 (“[T]he State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.”); CAL. EDUC. § 200 (“It is the policy of the State of California to afford all persons in public schools, regardless of their disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic . . . equal rights and opportunities in the educational institutions of the state.”); GA CONST. art. VIII, § 1, ¶ 1 (“The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia.”); N.J.

Many states have addressed the issue of educational rights in the context of school finance reform.⁵¹ For example, the Supreme Court of California examined California's school financing system, "which relies heavily on local property taxes and causes substantial disparities among individual school districts in the amount of revenue available per pupil for the districts' educational programs."⁵² In *Serrano v. Priest*,⁵³ the court found that, because the state financing system prevented districts with smaller tax bases from "spend[ing] as much money per child for education as districts with larger assessed valuations," it was unconstitutional under both the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and the California Constitution.⁵⁴ While the *Serrano* court addressed the issue of educational equality in the context of school finance reform, however, it noted that the "right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth."⁵⁵

Other states have relied on explicit education provisions embodied in their constitutions to address the issue of educational rights. Relying on provisions concerning education, some state supreme courts have found that "education is a fundamental right for state equal protection purposes."⁵⁶ As such, these courts held that their states must provide all public school students with equitable educational opportunities.⁵⁷ For example, the Supreme Court of Tennessee found that that state must afford students "substantially equal educational opportunities,"⁵⁸ and the Supreme Court of Vermont held that it "must ensure substantial equality of educational opportunity."⁵⁹

Other states have interpreted more ambiguous terms in their constitutions, such as "general and uniform" or "thorough and efficient" to mandate educational adequacy, equity, or both.⁶⁰ When the basis for a claim of unconstitution-

CONST. art. VIII, § 4, ¶ 1 ("The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State . . .").

⁵¹ Richard Briffault, *Adding Adequacy to Equity*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 25, 26 (Martin R. West & Paul E. Peterson eds., 2007).

⁵² *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Briffault, *supra* note 51, at 26 (referencing *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973)).

⁵⁷ *Id.*

⁵⁸ *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 156 (Tenn. 1993).

⁵⁹ *Brigham v. State*, 692 A.2d 384 (Vt. 1997).

⁶⁰ *E.g.*, *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 484 (Ark. 2002) (observing that "general, suitable, and efficient" mandates adequacy and equality); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1258 (Wyo. 1995) (concluding that the "complete

ality of a particular educational practice is a state constitutional or statutory provision—as opposed to state equal protection clauses—the “constitutional case for reform” is more legitimately based in a theory of inadequacy.⁶¹ Adequacy leaves room for some inequality while still recognizing and seeking to remedy the vast disparities in educational opportunities provided district wide or state wide.⁶²

When measuring adequacy, a court typically compares the quality of education in a plaintiff's district or school to the quality provided in others.⁶³ Courts may measure quality by inputs such as class size or teacher qualifications, or outputs such as student achievement or dropout rates.⁶⁴ Substantial inequalities are treated as “powerful evidence of inadequacy.”⁶⁵ Other courts may emphasize that because the “central purpose of the state constitution's education mandate is to enable children to compete successfully after graduation,” if students cannot compete with their peers, the educational system is inadequate.⁶⁶ In some states like California, however, adequacy and equity go hand in hand.⁶⁷

When state constitutions guarantee at least some level of balanced educational opportunities for all children in the public school system, such as the California Constitution, it is the duty of the state to ensure that statutes that include seniority protections do not encroach on these rights. This is particularly true in states like California where the California Supreme Court ruled in *Serrano* that education is a “fundamental right” under California law.⁶⁸

In *Butt v. State*, the California Supreme Court defined the substance of this fundamental right as follows:

[T]he State charter accords broader rights against State-maintained educational discrimination than does federal law California constitutional principles require State assistance to correct basic “interdistrict” disparities in the system of common schools, even when the discriminatory effect

and uniform” and “thorough and efficient” standards mandate equality). While “equity and adequacy are distinct legal theories, judicial approaches to adequacy clearly have been shaped by equity concerns,” where “significant inequalities are treated as powerful evidence of inadequacy.” Briffault, *supra* note 51, at 27–31.

⁶¹ Briffault, *supra* note 51, at 25.

⁶² *Id.*

⁶³ *Id.* at 27.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 28 (citing *Rose v. Council for a Better Educ.*, 790 S.W.2d 186, 212 (K.Y. 1989) (“[A]n efficient system of education must have . . . sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts.”); *Abbot v. Burke II*, 575 A.2d 359 (N.J. 1990) (emphasizing that adequacy must allow disadvantaged children to compete against their wealthier peers in more affluent districts).

⁶⁷ See *Butt v. State*, 842 P.2d 1240 (Cal. 1992).

⁶⁸ *Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1977).

was not produced by the purposeful conduct of the State or its agents.⁶⁹

The court held that “a finding of constitutional disparity depends on the individual facts.”⁷⁰ “[U]nless the actual quality of the district’s program, viewed as a whole, falls fundamentally below prevailing statewide standards,” as measured by statewide testing and achievement levels, “no constitutional violation occurs.”⁷¹ While the standard set forth in *Butt* examines interdistrict differences, the same analysis applies to a program that produces intradistrict disparities.⁷² Examining student achievement levels across a single school district provides part of the analysis used to determine whether the individual facts support a finding of “constitutional disparity.”⁷³ While courts do not always address both adequacy and equity arguments, no state court has found that its state was providing adequate education that was unconstitutionally unequal.⁷⁴ Thus, while some states may only guarantee “adequacy” in education, California guarantees both adequacy and equity.⁷⁵

C. Teacher Seniority Systems and “Last-In, First-Out” Protections

1. How LIFO Operates

At least twelve states⁷⁶ maintain statutes requiring that school districts conduct layoffs based solely on seniority.⁷⁷ Some of these states⁷⁸ provide for exceptions to this general requirement.⁷⁹ Others may leave layoff decisions to the discretion of the school districts.⁸⁰ Since 2011, many states have passed legislation reforming their teacher seniority in staffing policies.⁸¹

⁶⁹ *Butt*, 842 P.2d at 1249.

⁷⁰ *Id.* at 1252.

⁷¹ *Id.*

⁷² See generally Third Amended Complaint, *supra* note 1 (applying *Butt*’s analysis to LAUSD’s intradistrict disparities).

⁷³ *Butt*, 842 P.2d at 1252.

⁷⁴ Briffault, *supra* note 51, at 31.

⁷⁵ See *Butt*, 842 P.2d at 1240.

⁷⁶ ALASKA STAT. § 14.20.177 (2013); CAL. EDUC. CODE § 44955 (West 2013); HAW. REV. STAT. § 302A-609 (2013); KY. REV. STAT. ANN. § 161.800 (West 2013); MINN. STAT. § 122A.40 (2013); N.J. STAT. ANN. § 18A:28 (West 2013); N.Y. EDUC. LAW § 2510 (McKinney 2014); OR. REV. STAT. § 342.934 (2013); 24 PA. CONST. STAT. § 11-1125.1 (2014); R.I. GEN. LAWS ANN. § 16-13-6 (2013); W. VA. CODE § 18A-2-2 (2013); WIS. STAT. § 118.23 (2013); see also STUDENTS FIRST, *supra* note 4. (providing a graphic showing states’ risk of losing effective teachers due to LIFO statutes).

⁷⁷ DOWELL ET AL., *supra* note 4, at 3.

⁷⁸ E.g., ALASKA STAT. § 14.20.177; CAL. EDUC. CODE § 44955(d); OR. REV. STAT. § 342.934.

⁷⁹ DOWELL ET AL., *supra* note 4, at 3.

⁸⁰ E.g., 105 ILL. COMP. STAT. 5/24-12 (2013); MO. REV. STAT. § 168.221 (2013).

⁸¹ E.g., 150 ILL. COMP. STAT. 5/24-1.5;12 (2013) (stating that “length of continued service” shall not be a factor in filling new or vacant positions and that, while seniority is still a

When school districts must reduce their workforce, the application of strict seniority dictates that the newest teachers are almost always cut first.⁸² This LIFO policy ignores any factor other than seniority, including teacher performance, in effect “treating teachers like interchangeable parts.”⁸³ To determine the order in which teachers are laid off, school districts create a “seniority list,” listing years of service, and such factors as credentials, specialties, and federal NCLB qualifications.⁸⁴ Based on this list, the school board dismisses teachers, providing them with a reduction-in-force (RIF) notice, in an order of reverse seniority.⁸⁵ Seniority statutes provide either few or no exceptions to the system.⁸⁶

California’s layoff process is representative of states that only consider seniority, absent some exceptions, in making layoff determinations. While it is true that that NCLB requires states to train and recruit “high quality teachers” to teach in Title I schools⁸⁷ in order to qualify for federal funding, seniority lists

factor in determining reductions-in-force, collective bargaining agreements may provide for other means. However, “this provision shall not impair the operation of any affirmative action program in the district”); MASS. GEN. LAW. ANN. ch. 71, § 42 (West 2014) (“No teacher with [professional teacher] status shall be displaced by a more senior teacher with such status in accordance with the terms of a collective bargaining agreement or otherwise unless the more senior teacher is currently qualified pursuant to section thirty-eight G for the junior teacher’s position.”); MICH. COMP. LAWS ANN. § 380.1248 (West 2014) (“[T]he board of a school district or intermediate school district shall not adopt, implement, maintain, or comply with a policy that provides that length of service or tenure status is the primary or determining factor in personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position.”); OHIO REV. CODE ANN. § 3399.111 (West 2014) (“Seniority shall not be the basis for a decision to retain a teacher, except when making a decision between teachers who have comparable evaluations.”).

⁸² DOWELL ET AL., *supra* note 4, at 3.

⁸³ NEW TEACHER PROJECT, *supra* note 8, at 1.

⁸⁴ See, e.g., *Bledsoe v. Biggs Unified Sch. Dist.*, 170 Cal. Rptr. 3d 13, 24 (Cal. App. 2008). These additional factors, beyond years of service, are included in seniority lists (1) in anticipation of seniority “ties,” where the district must choose between laying off teachers with equal years of experience; or (2) in instances where LIFO statutes provide allow districts to skip newer teachers if such teachers possess specialized skills that only they can fill. E.g., CAL. EDUC. CODE § 44955(d)(1) (West 2011).

⁸⁵ DOWELL ET AL., *supra* note 4, at 1.

⁸⁶ *Id.* at 3.

⁸⁷ Title I schools are those with forty percent or more low-income students, as measured by participation in the federal free and reduced lunch program. *Fast Facts*, INST. OF EDUC. SCI., <http://nces.ed.gov/fastfacts/display.asp?id=158> (last visited Mar. 8, 2014). The goal of Title I is to “ensure that all children have a fair, equal and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic

in California do not take into account teacher *performance*.⁸⁸ Under NCLB, in order to meet high quality standards, teachers must “(1) have at least a bachelor’s degree from an accredited institution; (2) hold the appropriate state certification for each ESEA core academic subject⁸⁹ taught; and (3) demonstrate subject-matter competence for each ESEA core academic subject they teach.”⁹⁰ These qualifications are California’s baseline measure of quality—they do not include performance-based measures and thus are not included in seniority decisions.⁹¹

California law codifies seniority in statute, providing “certificated” employees (such as teachers, counselors, librarians, administrators, and nurses) with “vested rights in being retained” ahead of those with less seniority.⁹² The California Education Code provides that, barring statutory exceptions, a permanent employee—an employee whose position requires certification and who has been in a certified position for three consecutive years⁹³—may not be terminated while an “employee with *less seniority*, is retained to render a service which said permanent employee is certificated and competent to render.”⁹⁴ The code also provides a limited number of exceptions.⁹⁵ A school district “may deviate from terminating . . . in order of seniority” if:

The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services . . . and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services which others with more seniority do not possess.

For purposes of maintaining or achieving compliance with constitutional

standards,” which can be achieved by closing the achievement gap between “minority and nonminority students, and between disadvantaged children and their more advantaged peers.” 20 U.S.C. § 6301 (2012).

⁸⁸ See CAL. EDUC. CODE § 44955(d).

⁸⁹ In California, ESEA core academic subjects are defined as (1) English-language arts, (2) mathematics, (3) biological sciences, (4) chemistry, (5) geosciences, (6) physics, (7) social science, (8) foreign languages, (9) drama/theater, (10) visual arts, and (11) music. CAL. DEP’T OF EDUC., ELEMENTARY AND SECONDARY EDUCATION ACT TEACHER REQUIREMENTS RESOURCE GUIDE 2–3 (2011) (citing Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, § 1111(b)(8)(c), 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301–78 (2012))).

⁹⁰ *Id.*

⁹¹ DOWELL ET AL., *supra* note 4, at 8 (citing Forker v. Bd. of Trustees, 160 Cal. App. 3d 13, 19 (Cal. Ct. App. 1984)).

⁹² Bledsoe v. Biggs Unified Sch. Dist., 170 Cal. Rptr. 3d 13, 20 (Cal. App. 2008).

⁹³ CAL. EDUC. CODE § 44929.21 (West 2011).

⁹⁴ *Id.* § 44955 (emphasis added).

⁹⁵ *Id.*

requirements related to equal protection of the laws.⁹⁶

Thus, unless a school district can demonstrate that an educator with a specialized skill set is needed to carry out a task that a more senior teacher is incapable of performing, or unless the only remedy for a constitutional violation is deviation from seniority, California school districts may not deviate from seniority lists when making layoff determinations. A school district does not “have discretion to consider ‘quality of work performance’ in a layoff.”⁹⁷

2. Experience Trumps Quality

When LIFO-based policies govern layoffs, students who attend high-poverty (or low-income)⁹⁸ and high-minority schools are disproportionately harmed by high teacher turnover.⁹⁹ In districts where seniority governs hiring, firing, and other staffing decisions, teachers with more experience tend to choose open positions in wealthier and low-minority communities.¹⁰⁰ “Partly due to teacher collective bargaining agreements, teachers who have been” teaching in the district longer are “able to move and work in schools of their choosing.”¹⁰¹ As a result, “the poorest schools typically review the fewest applicants—many of whom lack the experience typical of applicants in wealthier schools.”¹⁰²

Nationally, teachers with less experience—who are statistically less effective than their more experienced counterparts—disproportionately teach low-income and high-minority students.¹⁰³ Although not all first-year teachers are of poor quality, even those who are “good” at the outset of their careers continue to “grow stronger after their first year in the classroom.”¹⁰⁴ When “among schoolhouse variables, teacher quality has the single most significant impact on student achievement,” students with newer teachers are at an increased risk that “their achievement will suffer.”¹⁰⁵

In urban centers and small towns, in particular, first-year teachers are assigned to high-poverty schools at “almost twice the rate that they are assigned

⁹⁶ *Id.* § 44955(d)(1)–(2).

⁹⁷ *DOWELL ET AL.*, *supra* note 4, at 8 (citing *Forker v. Bd. of Trustees*, 160 Cal. App. 3d 13, 19 (Cal. Ct. App. 1984)).

⁹⁸ As measured by the percentage of students who qualify for National School Lunch Program (NSLP), better known as the “free and reduced-lunch” program.

⁹⁹ See generally Third Amended Complaint, *supra* note 1.

¹⁰⁰ *SEPE & ROZA*, *supra* note 8, at 2.

¹⁰¹ *Id.*

¹⁰² *Id.* at 2–3.

¹⁰³ *ALMY & THEOKAS* *supra* note 8, at 3 (noting that in cities, whereas 4.4% of teachers in low-poverty schools are brand-new, 8.2% of teachers are brand-new in high-poverty schools). *Id.* (citing a U.S. Dep’t. of Educ. 2007–2008 school and staffing survey).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* “School house variables” are distinguishable from variables such as “parent engagement,” which is considered to be a factor contributing to school achievement outside the school house walls. *Id.*

to low poverty schools.”¹⁰⁶ Thus, schools with large low-income and minority populations are more likely to experience high teacher turnover when LIFO-based layoff policies force districts to terminate newer teachers.¹⁰⁷ Teacher turnover means that “the process of building and sustaining relationships” and site-specific professional development “starts anew,” and reassigned teachers who may not be happy with new assignments put in less effort, destabilizing schools and affecting student achievement.¹⁰⁸

In eleven of California’s fifteen largest school districts,¹⁰⁹ less experienced teachers are more likely to teach students attending schools in the highest-poverty and highest-minority quartiles.¹¹⁰ Teachers at risk for layoffs are more heavily concentrated in high-minority and high-poverty schools.¹¹¹ In fact, “where seniority-based layoffs are applied for teachers up to two years experience . . . high poverty schools will lose some 30% more teachers than wealthier counterparts.”¹¹² High-minority schools are at risk of losing sixty percent more teachers than those schools with fewer minorities.¹¹³ This is true in other states as well: high-poverty schools in forty-three out of Texas’s fifty districts had a more “novice” teachers than low-poverty schools; in forty-two out of those fifty districts, a greater amount of novice teachers taught in the highest-minority than in the lowest-minority schools.¹¹⁴

Such disparities were particularly pronounced in the three LAUSD schools—Gompers, Liechty, and Markham middle schools—which were at the center of the class action lawsuit in *Reed v. State*.¹¹⁵ During the 2008–2009 school year, teachers at Gompers, Liechty, and Markham (the plaintiffs’ schools) had an average number of 5.0, 3.5, and 7.2 years of teaching experience, respectively, as compared to an average of 11.6 years across LAUSD and 13.1 years statewide.¹¹⁶ When budget shortfalls forced the LAUSD to issue pink slips that year, forty-six to sixty percent of the teaching staff at the three middle schools received RIF notices.¹¹⁷ District wide, LAUSD sent RIF notices to an average

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ SEPE & ROZA, *supra* note 8, at 2.

¹⁰⁹ *Id.* at 4–5 (discussing teacher experience data from the 2008–2009 school year provided by the California Department of Education); *see also DataQuest*, CAL. DEP’T OF EDUC., <http://data1.cde.ca.gov/dataquest> (last updated Nov. 8, 2013).

¹¹⁰ SEPE & ROZA, *supra* note 8, at 5.

¹¹¹ *Id.* at 4.

¹¹² *Id.*

¹¹³ *Id.* at 5.

¹¹⁴ *Id.* at 3–4.

¹¹⁵ Third Amended Complaint, *supra* note 1, at 14–15.

¹¹⁶ *Id.*

¹¹⁷ Twenty-one of Liechty’s 47 RIF-ed teachers, 20 of Gompers’s 38 RIF-ed teachers, and 17 of Markham’s 33 RIF-ed teachers were rehired as long term substitutes the following

17.9% teachers.¹¹⁸ As compared to the plaintiffs' schools' RIF rate, however, three middle schools in more affluent communities experienced a RIF rate of one to seven percent.¹¹⁹

RIFed teachers from other LAUSD schools filled the remaining vacancies at the plaintiff's schools:

LAUSD thus replaced teachers who specifically trained for and wanted to teach in Plaintiffs' schools, who had experience teaching at Plaintiffs' schools, and who had invested time and energy building relationships and trusts with Plaintiffs, with teachers who did not necessarily want to be in these schools. In many instances, the teachers from the rehire list refused to accept the positions, further delaying placement of a permanent teacher in the classroom.¹²⁰

When schools could not fill vacant positions, they were forced to use short-term substitutes.¹²¹ Under state law, short-term substitutes cannot substitute for a single teacher for longer than thirty days, unless they are fully credentialed to teach in the subject area in which they are substituting.¹²² As a result, students were forced to attend classes that were staffed by as many as ten rotating substitutes, many without the proper training or credentials.¹²³ Rotating substitutes "precluded the development of coherent lesson plans and prevented the creation of adequate student records With this level of instability and discontinuity in a classroom . . . [t]he classrooms were effectively reduced to nothing more than childcare."¹²⁴ It became impossible effectively, or even adequately, to teach students state-content standards and reach student achievement goals.¹²⁵

The United States Department of Education found that as "[c]ompared with other schools, traditionally disadvantaged schools . . . had higher percentages of teachers who were not considered highly qualified" under NCLB standards when measured during 2006 and 2007.¹²⁶ Even if NCLB-qualified permanent teachers fill vacant positions in high-minority, low-income schools, however, many replacements are "misassigned" to classrooms where they do not have the requisite certification or training to teach the subject matter or at the grade

school year. At each of these schools, however, 16 to 33% of the schools' teaching positions remained vacant at the beginning of the 2009–2010 school year. *Id.*

¹¹⁸ *Id.* at 15.

¹¹⁹ *Id.* These three middle schools are located in the communities of Chatsworth, North Hollywood, and Northridge. *Id.*

¹²⁰ Third Amended Complaint, *supra* note 1, at 16.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 17.

¹²⁴ *Id.* at 17–18.

¹²⁵ *See id.* at 18.

¹²⁶ U.S. DEP'T OF EDUC., STATE AND LOCAL IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT: VOLUME III—TEACHER QUALITY UNDER NCLB: FINAL REPORT, at xxvi (2009).

level¹²⁷ to which they are reassigned.¹²⁸ According to data compiled by California's Commission on Teacher Credentialing:

Every year in California, public school administrators assign thousands of teacher to classes for which they lack the credentials or legal authorization to teach Nearly 1 in 10 teachers or certificated personnel—more than 32,000 school employees—did not have the credentials or authorization for their positions from 2007 through 2011 In the 2010–11 school year, more than 12,000 teachers and certificated personnel at more than 1,000 low-performing schools served in positions they should not have held.¹²⁹

Interviews and research attribute these “misassignments” to staffing turnover and shortages, insufficient resources, and poor planning and mismanagement.¹³⁰ Teachers who are laid off and later reassigned “are not always qualified in the subjects or available in the locations that schools need.”¹³¹ Thus, even when schools can find a permanent replacement who meets the minimum “highly qualified” standard under NCLB, such teachers may still fall into this misassigned category, reducing the quality of learning students receive.

Teacher quality is a significant predictor of state-level student achievement.¹³² In fact, “while student demographic characteristics are strongly related

¹²⁷ Third Amended Complaint, *supra* note 1, at 19. The “rehire” list for middle schools includes teachers with only elementary school or high school experience “who are not familiar with subject content or state standards or with challenges dealing with middle school students. The learning curve for these teachers is extremely steep. These teachers generally struggle with classroom management and instructional quality suffers as a result.” *Id.*

¹²⁸ *See id.* (“At Gompers, the total teacher misassignments rose from 100 in 2008–2009 to 152 after the RIF. The number of teachers misassigned to teach English learners rose from 47 to 63. At Markham, the total rose from 112 to 216 and for English learners from 50 to 99. At Liechty, the total rose from 283 to 317 and for English learners from 35 to 56. The RIF therefore reversed trends reducing the number of misassignments at Plaintiffs’ schools. By contrast, the RIF actually resulted in fewer misassignments of teachers at LAUSD schools. For example, at Revere Middle School I Pacific Palisades, the number dropped by 53%; at Burroughs Middle School in Hancock Park, by 5%; and at Palms Middle School, by 15%.”).

¹²⁹ *Id.*

¹³⁰ *See id.*

¹³¹ *See id.*

¹³² Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, EDUC. POL’Y ANALYSIS ARCHIVES, Jan. 2000, at 1. To measure the correlation between teacher qualifications and student achievement, Darling-Hammond used data on public school teacher qualifications and other school inputs available from the 1993 to 1994 Schools and Staffing Surveys (SASS) and data on student achievement and student characteristics from the 1990, 1992, 1994, and 1996 assessments in reading and mathematics administered by the National Assessment of Educational Progress. This data was the “basis for regression analyses of school resource variables on student achievement scores to examine whether teacher quality indicators, as well as other school inputs, are related to stu-

to student outcomes at the state level, they are less influential in producing achievement levels than are variables assessing the quality of the teaching force.”¹³³ Particularly at those schools where the majority of the student population are not learning at grade level and lag behind statewide achievement standards, a teacher who cannot teach effectively because she does not have the requisite training or certification only widens the achievement gap. When students, such as the plaintiffs in *Reed*, spend years attending schools that fail to address their academic needs, the instability that comes with rotating substitutes or unqualified replacement teachers only exacerbates the achievement gap and produces a population of skeptical students who distrust their teachers’ commitment to their growth.¹³⁴ The “net result” of California LIFO policies in LAUSD was to “force out” qualified teachers who knew and built relationships with the students and understood which strategies and methods of learning worked best for the students at their schools.¹³⁵

Ultimately, the concentration of newer teachers in high-poverty and high-minority schools, together with the application of LIFO policies to cut the workforce during budget deficits, produce a disparate impact on the quality of education received by students in high-poverty and high-minority schools.

D. *California’s Seniority System Today*

In California, administrative law judges (ALJs) and courts have previously applied section 44955(d)(1) to deviate from seniority protections.¹³⁶ For example, the Court of Appeal of California’s Third District found that, during a time of “economic layoff,” section 44955(d)(1) authorizes a school district to

dent achievement at the state level, after controlling for such student characteristics as poverty and language background.” “Teacher quality variables” constructed from this data:

Include the proportion of “well-qualified teachers,” defined as the proportion holding state certification and the equivalent of a major (either an undergraduate major or masters degree) in the field taught. For elementary school teachers, the equivalent of a major is an elementary education degree for generalists who teach multiple subjects to the same group of students or a degree in the field taught for specialists (e.g. reading, mathematics or mathematics education, special education). The proportion of teachers who are “fully certified” includes teachers with standard or regular certification and new teachers on probationary certificates who have completed all requirements for a license except for the completion of the probationary period (usually two or three years of beginning teaching). The proportion of teachers who are “less than fully certified” includes teachers with no certificate and those with provisional, temporary, or emergency certification.

Id.

¹³³ *Id.* at 32.

¹³⁴ See Third Amended Complaint, *supra* note 1, at 22.

¹³⁵ *Id.*

¹³⁶ See generally *Bledsoe v. Biggs Unified Sch. Dist.*, 170 Cal. Rptr. 3d 13 (Cal. App. 2008).

“skip”¹³⁷ a junior employee and terminate an employee with more seniority when the junior employee possesses specialized training and experience to meet the specific needs of a school district.¹³⁸ In *Bledsoe v. Biggs Unified School District*, the court found that the school district had “a specific need” for teachers with backgrounds working with children with behavioral problems to teach in a community day school that served a “distinct and difficult population” of students who had been “expelled or who had extreme behavior difficulties.”¹³⁹ As the retained junior teachers were found to have extensive background and training in areas such as “mediation, aggression management, and abuse recognition,” the court held that the district properly skipped two junior teachers while terminating a senior teacher with fewer specified and desired skills.¹⁴⁰

Section 44955(d)(2) has never been used in any reported ALJ “decision to support skipping” by any school district in California.¹⁴¹ While section 44955(d)(1), as evidenced in *Bledsoe*, is a means by which to protect teachers on a case-by-case basis, the second exception under section 44955(d)(2) may provide protection for classes of teachers laid off as a result of economic layoffs.¹⁴² In fact, California has seen a rise in litigation brought under section 44955(d)(2), claiming that economic layoffs based solely upon seniority violate a student’s right, under the California Constitution, to equity in educational opportunities.¹⁴³ Two of these cases are *Reed* and *Vergara v. State of California*.¹⁴⁴ However, the California courts have yet to resolve the issue decisively.

1. *Reed v. State of California, et al.*

In February 2010, the ACLU filed a class action suit on behalf of students at three LAUSD middle schools alleging that LAUSD’s proposed layoff plan for the 2010–2011 school year violated the California Constitution¹⁴⁵ and other statutes.¹⁴⁶ Plaintiffs filed the action, *Reed v. State*, against the State of Califor-

¹³⁷ “For purposes of a school district reduction in force, ‘skipping’ refers to a junior teacher being retained for specified reasons.” *Id.* at 18 n.3 (citing CAL EDUC. CODE § 44955(b) (West 2011); *Alexander v. Bd. of Trustees*, 188 Cal. Rptr. 3d 705 (1983)).

¹³⁸ *Bledsoe*, 170 Cal. Rptr. 3d at 20.

¹³⁹ *Id.* at 24.

¹⁴⁰ *Id.* at 25.

¹⁴¹ DOWELL ET AL., *supra* note 4, at 9.

¹⁴² See, e.g., Third Amended Complaint, *supra* note 1.

¹⁴³ *Id.*

¹⁴⁴ *Id.*; First Amended Complaint, *supra* note 10, at 1.

¹⁴⁵ Specifically, the ACLU asserted violations of article I, section 7(a)–(b); article IV section 16(a); and article IX, sections 1 and 5 of the California Constitution.

¹⁴⁶ CAL. GOV’T CODE § 11135 (“No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or

nia, LAUSD, United Teachers of Los Angeles (UTLA), and the Partnership for LA Schools, an independent educational non-profit organization that operates seventeen LAUSD schools under an agreement with the school district.¹⁴⁷ Plaintiffs sought declaratory and injunctive relief, specifically asking that the court enjoin the defendants from: (1) engaging in RIF layoffs in the 2010–2011 year; (2) implementing future layoffs that exceeded the district average; and (3) allowing economic layoffs to create a “higher rate of annual teacher turnover.”¹⁴⁸ Plaintiffs also sought to prevent future harm by asking the court to provide supplemental educational services and financial resources at the plaintiffs’ schools.¹⁴⁹

The complaint alleged that, as a result of the seniority protection in section 44955 and LAUSD’s collective bargaining agreement, LAUSD’s implementation of layoffs to address its budget shortfall disproportionately impacted schools which serve high concentrations of low-income students, students of color, and English learners.¹⁵⁰ At the plaintiffs’ schools, between 46% and 60% of teachers were sent layoff notices, whereas the district-wide average was 17.9%.¹⁵¹ The complaint alleged that the disproportionately high rates of teacher turnover at the plaintiffs’ schools contributed substantially to low academic achievement because “teacher stability is a key aspect of student achievement . . . because it is necessary to build trusting student-teacher relationships and because it helps teachers learn how to teach effectively and within the particular school community.”¹⁵² It further alleged that efforts of school administrators to build stable, effective teaching corps were heavily undercut by high turnover rates.¹⁵³ Assigning replacement teachers to “courses in which they do not have the requisite certification or training” further destabilized student academic achievement,¹⁵⁴ short term substitutes were frequently rotated to fill vacancies, and teachers from the rehire list either refused to accept positions at low per-

administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state”); Third Amended Complaint, *supra* note 1, at 29–31.

¹⁴⁷ Third Amended Complaint, *supra* note 1, at 1. While procedurally, the State of California, LAUSD, and Partnership for LA Schools had to play the role of defendants, they ultimately supported the plaintiff’s litigation. These defendants, unlike UTLA, supported deviating from the LIFO policies, but felt their hands were tied because of LAUSD’s collective bargaining agreements. In their minds, litigation was the only way to force change.

¹⁴⁸ *Id.* at 32.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 3.

¹⁵² *Id.* at 12; *see also* ALMY & THEOKAS, *supra* note 8; NEW TEACHER PROJECT, *supra* note 8; SEPE & ROZA, *supra* note 8.

SEPE & ROZA, *supra* note 98, at 2.

¹⁵³ Third Amended Complaint, *supra* note 1, at 2.

¹⁵⁴ Revised Findings and Order on Plaintiffs’ Motion for Preliminary Injunction at 4,

forming schools, or quit after only a few days because “they [were] not able or willing to work in the school.”¹⁵⁵

The plaintiffs argued that as the California courts have recognized that the state constitution guarantees educational equity and adequacy as a fundamental right, “any action that has a real and appreciable impact upon the right to basic educational equity is subject to strict scrutiny” and should be deemed unconstitutional.¹⁵⁶ In the plaintiffs’ case, the disproportionate impact of layoffs and resulting teacher turnover had a “real and appreciable impact” upon students’ constitutional rights.¹⁵⁷

The trial court issued a preliminary injunction enjoining LAUSD from implementing any budget-based layoffs of classroom teachers at the plaintiffs’ schools, and held that these classroom teachers “shall not be subject to bumping . . . nor . . . displacement by more senior employees.”¹⁵⁸ The evidence supported the finding of a “distinct relationship between high teacher turnover and the quality of educational opportunities afforded” students, and showed that “high teacher turnover devastates educational opportunity.”¹⁵⁹ Relying on *Butt, Serrano II*,¹⁶⁰ and *O’Connell v. Superior Court*,¹⁶¹ the court found that the evidence was sufficient to support a finding that the layoff system resulted in “disparate treatment” with a “real and appreciable impact” on the plaintiffs’ “fundamental interest in education.”¹⁶² The court rejected the argument that the seniority system furthered a “compelling state interest”:

[T]he Education Code expressly qualifies these seniority rights, allowing deviations for pedagogical needs and constitutional interests The plain language of [§ 44955(d)(2)] clearly applies to a situation in which layoffs would result in a violation of students’ equal protection rights . . . LAUSD could not bargain away students’ constitutional rights. In other words, teachers do not have a vested interest in the application of seniority in a layoff that will result in an equal protection violation¹⁶³

Following the preliminary injunction, the court approved a consent decree¹⁶⁴ negotiated among the majority of the parties subject to the suit, extending some

Reed v. State, 2011 WL 10893745 (Cal. Super. Ct. May 13, 2010) (No. BC432420) [hereinafter Revised Findings and Order].

¹⁵⁵ Third Amended Complaint, *supra* note 1, at 15–16.

¹⁵⁶ *Id.* at 6.

¹⁵⁷ *Id.*

¹⁵⁸ Revised Findings and Order, *supra* note 154, at 9.

¹⁵⁹ *Id.* at 4.

¹⁶⁰ 18 Cal. 3d 728 (1976).

¹⁶¹ 141 Cal. App. 4th 1452 (2006).

¹⁶² Revised Findings and Order, *supra* note 154, at 1–2.

¹⁶³ *Id.* at 7.

¹⁶⁴ “A consent decree is no more than a settlement that contains an injunction.” Reed v. United Teachers L.A., 145 Cal. Rptr. 3d 454, 457 n.1 (Cal. Ct. App. 2012) (citing *In re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020, 1025 (2d Cir. 1992)).

terms of the preliminary injunction to a “targeted” group of schools beyond those of the plaintiffs.¹⁶⁵

Although the trial court found sufficient merit in the plaintiffs’ arguments to warrant a preliminary injunction to temporarily halt LAUSD’s application of LIFO provisions, the trial court never decided the merits underlying the plaintiffs’ claims because the majority of parties settled.¹⁶⁶

All parties except UTLA agreed to the terms of the consent decree.¹⁶⁷ UTLA appealed the decree to the Court of Appeal of the State of California.¹⁶⁸ The court reversed and remanded on due process grounds, finding that, “because the trial court never decided the merits of the Students’ claims, it erred when it approved the consent decree and entered judgment against UTLA.”¹⁶⁹ On April 8, 2014, the parties reached a new settlement agreement.¹⁷⁰ The agreement:

[C]alls for hiring additional assistant principals, counselors and special education support staff, expanding professional development for teachers and administrators, offering a bonus to retain and recruit principals to these high-need schools, and selecting experienced mentor teachers from school staffs. The new programs represent an investment of more than \$25 million in the budget proposed by LAUSD Superintendent’s Office on April 4.¹⁷¹

However, the agreement does not protect schools from layoffs, thus leaving open the constitutional questions.¹⁷² As of the time of this Note’s publication, the trial court has yet to approve the settlement.

2. Vergara v. State of California

In May 2012, a California nonprofit filed a complaint on behalf of students in four California school districts challenging the constitutionality of five sec-

¹⁶⁵ The settlement agreement provided that the plaintiffs’ schools and forty-five schools (including the twenty-five schools with the highest teacher turnover rates that also displayed academic improvements, as well as twenty “new schools”) would be deemed targeted schools and “skipped” in the event of layoffs. The agreement further provided that collaborative efforts would be undertaken to fill teacher vacancies at the targeted schools and implement programs to retain quality teachers. *Settlement Terms*, ACLU, <http://www.aclu-sc.org/cases/reed-v-state-of-california/reed-settlement-terms> (last visited July 22, 2014).

¹⁶⁶ *United Teachers*, 145 Cal. Rptr. at 328.

¹⁶⁷ Press Release, United Teachers L.A., ACLU Settlement: Why the Students Lose (Apr. 2, 2011), available at <http://www.utla.net/reedcase>.

¹⁶⁸ *United Teachers*, 145 Cal. Rptr. at 457 n.1.

¹⁶⁹ *Id.* at 17.

¹⁷⁰ Press Release, American Civil Liberties Union of S. Cal. Settlement of Reed lawsuit delivers for students at 37 struggling L.A. schools (Apr. 8, 2014), <http://www.aclusocal.org/pr-reed-settlement/>.

¹⁷¹ *Id.*

¹⁷² See generally *id.*

tions¹⁷³ of the California Education Code.¹⁷⁴ Among those challenged is section 44955, the LIFO statute.¹⁷⁵ The *Vergara v. State* claims were broader than the claims in *Reed*.¹⁷⁶ *Reed* was an as-applied challenge to LAUSD's layoff system, arguing that the layoff system, as implemented by LAUSD, leads to inequitable opportunities for students.¹⁷⁷ Thus, as the trial court found, section 44955(d)(2) mandates "skipping" of teachers in the Plaintiffs' schools, and other schools similarly situated.¹⁷⁸ *Vergara* adopted *Reed*'s argument, but went further, presenting a *facial* challenge to the constitutionality of Section 44955 in its entirety.¹⁷⁹

The *Vergara* complaint alleged that section 44955 violates article I, section 7 and article IV, section 16 of the California Constitution because the statute has a:

[R]eal and appreciable negative impact on an arbitrary subset of children of substantially equal age, aptitude, motivation, and ability, depriving them of substantially equal access to an education sufficient to equip them with the critical, fundamental tools minimally necessary to compete in the economic marketplace and to participate in a democratic society.¹⁸⁰

The complaint further alleged that, because "both race and wealth are suspect classes for purposes of evaluating statutes in light of the California Constitution's provisions guaranteeing equal protection of the laws," section 44955 violates the equal protection provisions, because it "makes the quality of education for school age children in California a function" of race and wealth.¹⁸¹ The plaintiffs requested: (1) declaratory relief stating that the statutes violate the equal protection provisions of the California Constitution; (2) permanent injunctive relief enjoining the enforcement, application or implementation of the statutes; and (3) permanent injunctive relief enjoining future implementation, "by law or by contract," "substantially similar frameworks" to those prescribed in the statutes.¹⁸²

The *Vergara* trial concluded on April 2, 2014.¹⁸³ On June 10, 2014 the *Ver-*

¹⁷³ CAL. EDUC. CODE §§ 44929.21(b), 44934, 44938(b)(1)–(2), 44944, 44955 (West 2011).

¹⁷⁴ First Amended Complaint, *supra* note 10, at 1.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See generally Third Amended Complaint, *supra* note 1.

¹⁷⁸ Revised Findings and Order, *supra* note 154, at 7.

¹⁷⁹ First Amended Complaint, *supra* note 10, at 17–18.

¹⁸⁰ *Id.* at 22.

¹⁸¹ *Id.* at 23–24.

¹⁸² First Amended Complaint, *supra* note 10, at 26.

¹⁸³ Press Release, Students Matter, Groundbreaking Education Equality Trial, *Vergara v. California*, Concludes (Apr. 2, 2014), http://studentsmatter.org/ai/ec_event/vergara-trial-day-33/?instance_id=104.

gara court issued a tentative decision in plaintiffs' favor.¹⁸⁴ Applying a strict scrutiny test, the court held California's LIFO statute unconstitutional under the equal protection clause of the California Constitution and issued an injunction against the enforcement of the statute.¹⁸⁵

In issuing its decision the court stated that evidence had shown that California's LIFO statute provided no exceptions or waivers based on teacher effectiveness, meaning that:

No matter how gifted the junior teacher, and no matter how grossly ineffective the senior teacher, the junior gifted one, who all parties agree is creating a positive atmosphere for his/her students, is separated from them and a senior grossly ineffective one who all parties agree is harming the students entrusted to her/him is left in place. The result is classroom disruption on two fronts, a lose-lose situation.¹⁸⁶

Thus, the court found that that the State of California and California Teachers Association, as defendants, had failed to prove that state as a "compelling interest in the *de facto* separation of students from competent teachers, and a like interest in the *de facto* retention of incompetenced ones."¹⁸⁷ Plaintiffs however, had proven by a preponderance of the evidence, that the Section 44955 imposes a "real and appreciable impact on students' fundamental right to equality fo education" and a "disproportionate burden on poor and minority students."¹⁸⁸

Unfortunately, it is unlikely that trial court will have the last word. The California Teachers Association plans to appeal the ruling.¹⁸⁹ State Attorney General Kamala Harris is currently reviewing the decision with Governor Jerry Brown to determine whether or not the State will also appeal.¹⁹⁰ Thus, what is and what is not the law will likely remain uncertain until all appeals are exhausted.¹⁹¹

As California's first lawsuits to address the constitutionality of layoff and seniority systems, *Reed* and *Vergara* set the scene for the broader discussion

¹⁸⁴ Tentative Decision at 14, *Vergara v. State*, 2013 WL 6912923 (Cal. Super. Ct. June 10, 2014) (No. BC484642), available at <http://studentsmatter.org/wp-content/uploads/2014/06/Tenative-Decision.pdf> [hereinafter Tentative Decision].

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 13–14.

¹⁸⁷ *Id.* at 14.

¹⁸⁸ *Id.* at 8.

¹⁸⁹ Jennifer Medina, *Judge Rejects Teacher Tenure for California*, N.Y. TIMES (June 10, 2014), http://www.nytimes.com/2014/06/11/us/california-teacher-tenure-laws-ruled-unconstitutional.html?hp&_r=2; see also Interview by Alysha Stein-Manes with Griffin Schein staff (Feb. 26, 2014). Griffin Schein was hired by Students Matter to handle public relations for the *Vergara* trial. See STUDENTS MATTER, <http://studentsmatter.org/contact/> (last visited July 28, 2014).

¹⁹⁰ Medina, *supra* note 189.

¹⁹¹ See generally *id.*

about balancing the rights of students against those of educators. At the core of that discussion is whether states should repeal LIFO statutes entirely, or, at least, comply with “constitutional requirements related to equal protection of the laws” by using skipping provisions like section 44955(d)(2).¹⁹² This Note takes the position, however, that while alternatives to repealing LIFO statutes in their entirety may exist, such alternatives only breed success if stakeholders put the interests of our children ahead of politics.¹⁹³

E. *The Legislative Alternative: How Other States Use Legislation to Reform Teacher Seniority*

California lawmakers have attempted to address seniority reform through legislation and have thus far failed to effect change using such a mechanism.¹⁹⁴ Responding to this failure, California’s reformers turned to the courts to reform seniority.¹⁹⁵ Other states take different approaches, some more successful than others.

In Connecticut, where there is no statutory provision requiring that school districts conduct layoffs in reverse seniority, almost all collective bargaining agreements establish layoffs in reverse-seniority order.¹⁹⁶ A 2002 school accountability statute, however, authorizes state officials to intervene in schools and school districts that are continually “low achieving.”¹⁹⁷ When schools fail to meet academic performance targets for four consecutive years, the State Board of Education may take “corrective action” to improve student achievement.¹⁹⁸ Corrective action may include directing the “transfer and assignment of teachers and principals.”¹⁹⁹ Under these provisions, Hartford Public Schools, located in the Connecticut county with the lowest median income and greatest number of minority students, submitted a proposal to the Connecticut State Board of Education requesting that the board order the district to conduct layoffs at the school rather than district level.²⁰⁰ Hartford Public Schools reasoned that seniority-based layoffs significantly undermined efforts to improve student achievement district wide.²⁰¹ Rather than intervene, however, the board asked the teachers union and Hartford Board of Education to enter into mediation.²⁰²

¹⁹² CAL EDUC. CODE § 44955 (West 2011).

¹⁹³ See *infra* Section III.C.

¹⁹⁴ Sawchuk, *supra* note 3.

¹⁹⁵ *Id.*

¹⁹⁶ CONN. GEN. STAT. § 10-223e(e) (2010).

¹⁹⁷ DOWELL ET AL., *supra* note 4, at 25.

¹⁹⁸ *Id.* at 26.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 28.

²⁰¹ *Id.*; see also Conn. State Bd. of Educ., Meeting Minutes (Apr. 7, 2010), available at http://www.sde.ct.gov/sde/lib/sde/pdf/board/minutes2010/minutes_SBE_040710.pdf.

²⁰² DOWELL ET AL., *supra* note 4, at 29.

The parties, however, failed to come to a resolution.²⁰³

In New York, the Senate presented and passed a bill which would prohibit layoffs based solely on seniority and require consideration of other factors such as teacher effectiveness.²⁰⁴ However, the assembly killed the bill.²⁰⁵

Although, like New York, the majority of states with seniority statutes have failed to muster the necessary votes to reform the statutes; four of these states successfully passed legislation reforming statutes that school districts to conduct layoffs in reverse-seniority order.²⁰⁶ In June 2011, Illinois Governor Pat Quinn signed into law bipartisan legislation, supported by the Illinois Federation of Teachers, the Chicago Teachers Union and the Illinois Education Association, which required school districts to consider student achievement when making layoff decisions.²⁰⁷ That same month, Ohio, through its state budget bill, H.B. 153, enacted a provision requiring school districts with collective bargaining agreements²⁰⁸ to use factors other than seniority in layoff and rehiring decisions.²⁰⁹ In July 2011, Michigan Governor Rich Snyder signed into law H.B. 4627, requiring school boards to use factors other than seniority in layoff decisions, unless two employees are considered “equal” using other stan-

²⁰³ *Id.*

²⁰⁴ S.B. 3501, 2011 Leg., 234th Sess. (N.Y. 2011) *available at* <http://open.nysenate.gov/legislation/bill/S3501-2011>; NEW TEACHER PROJECT, *supra* note 8, at 11.

²⁰⁵ *Id.*

²⁰⁶ MASS. GEN. LAW. ANN. ch. 71, § 42 (West 2014) (“No teacher with [professional teacher] status shall be displaced by a more senior teacher with such status in accordance with the terms of a collective bargaining agreement or otherwise unless the more senior teacher is currently qualified pursuant to section thirty-eight G for the junior teacher’s position.”); MICH. COMP. LAWS ANN. § 380.1248 (West 2014) (“[T]he board of a school district or intermediate school district shall not adopt, implement, maintain, or comply with a policy that provides that length of service or tenure status is the primary or determining factor in personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position.”); OHIO REV. CODE ANN. § 3399.111 (West 2014) (“Seniority shall not be the basis for a decision to retain a teacher, except when making a decision between teachers who have comparable evaluations.”).

²⁰⁷ Fact Sheet, Dep’t of Gov. Relations, Ill. Educ. Ass’n, Unions Stand Together to Forge Historic Education Reform: SB7 Will Keep the Best Teachers in Classrooms and Ensure the Teachers’ Voice Remains Strong at the Bargaining Table (2011), *available at* <http://www.ieanea.org/media/2011/03/SB7-fact-sheet-4-16.pdf>.

²⁰⁸ The bill governs those collective bargaining agreements signed after September 2011. *See* OHIO REV. CODE ANN. § 3399.111.

²⁰⁹ Molly Bloom, *SB 5 or No, Seniority Is Out of Teacher Layoff Decisions*, STATEIMPACT (Mar. 20, 2012), <http://stateimpact.npr.org/ohio/2012/03/20/sb-5-or-no-seniority-is-out-of-teacher-layoff-decisions>.

dards.²¹⁰ Most recently, in June 2012, Massachusetts Governor Deval Patrick signed S. 2315, “An Act Providing for the Implementation of Education Evaluation Systems in School District,” into law. This bill was a compromise between the Massachusetts Teachers Association and the nonprofit organization Stand for Children, and makes job performance a primary factor in staffing decisions, while allowing unions and school districts to keep their collective bargaining powers in layoff decisions.²¹¹ Stand for Children was set to sponsor a November 2012 ballot initiative which would have eliminated seniority from the state’s public school system.²¹² While both sides were mobilized to put up a fight at the ballot box, “with neither side confident of the outcome,” a decision to compromise seemed a better alternative.²¹³

Despite statutes, constitutions, or court holdings compelling adequacy or equity in educational opportunities, the majority of states with statutes protecting seniority continue to compete for a balance between protecting the rights of students and those of educators.²¹⁴ While states such as Massachusetts and Michigan can serve as examples for states that seek to reform seniority, the fact remains that the political and economic climates of each state are different. If all stakeholders cannot be a part of the debate and learn to compromise, the seniority status quo will remain as it is, or reforms will look to the courts for answers.

III. ARGUMENT

The LIFO policies in LAUSD, across California, and in many other states generate inadequate and inequitable opportunities for poor and minority students.²¹⁵ The instability created by high teacher turnover, a barrage of substitute teachers, and “misassigned” teachers make it impossible for students at those schools deeply impacted by layoffs to learn, let alone “catch up” to their peers at schools with stable teaching populations and teachers who are adequately prepared to teach in the subject area and grade level to which they are assigned.²¹⁶

Where states like California deem education a fundamental right and their state constitutions, as interpreted by the courts, mandate equity or adequacy in educational opportunities, they fall short of fulfilling their responsibilities when

²¹⁰ MICH. COMP. LAWS ANN. § 380.1248.

²¹¹ Jamie Vaznis, *Unions Won’t Oppose Teacher Seniority Measure*, BOS. GLOBE, June 21, 2012, at B1; WWLP TV, *Teacher Performance to Trump Seniority*, ONPOLITIX (June 21, 2012, 6:19 PM), <http://massachusetts.onpolitix.com/news/125118/wwlp-teacher-performance-to-trump-seniority-cl>.

²¹² Vaznis, *supra* note 211, at B1.

²¹³ *Id.*

²¹⁴ See *supra* text accompanying notes 105–114.

²¹⁵ See *supra* Section II.C.

²¹⁶ See *supra* Section II.C.

they fail to provide the same educational tools and opportunities to *all* children. While LIFO statutes may not in themselves be unconstitutional,²¹⁷ as it stands today, states that guarantee students adequate or equitable educational opportunities and simultaneously adhere to strict applications of LIFO statutes produce disparate impacts on poor and minority students. *These disparate impacts are unconstitutional.* As such, states, school districts, teachers unions and other stakeholders must work together to find solutions to rebalance the rights of students and teachers to fit more comfortably within each state's constitutional framework.

A. *California Must Utilize a More Rigorous Application of Section 44955(d)(2)*

California has a constitutional duty to ensure that it provides adequate and equitable educational opportunities to its children as educational opportunities "are among the privileges and immunities that may not be granted to some citizens or classes of citizens but not provided on the same terms to all citizens."²¹⁸ California fails to meet this duty when it allows school districts across the state, and particularly in LAUSD, to layoff its teachers in disproportionate percentages across schools. Where only forty-six to sixty percent of teaching staff were RIFed at three middle schools in low-income and high-minority communities, as compared to 17.9% district-wide and one to seven percent in more affluent communities, children cannot receive equitable opportunities.²¹⁹ Thus, to the extent that California's LIFO statute results in higher layoffs in high-poverty and high-minority schools, California must at the very least allow school districts to deviate from seniority when issuing pink slips, pursuant to section 44955(d)(2)'s exception.²²⁰

Section 44955(d)(2) reads that, "[f]or purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws," a district may deviate from termination in order of reverse-seniority.²²¹ *Butt* held that the California Constitution requires the state to correct disparities the "system of common schools, even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents."²²² While a finding of disparity is case specific, the statistics presented by LAUSD confirm a vast disparity between schools.²²³ The LIFO policies create an "arbitrary dis-

²¹⁷ The *Vergara* plaintiffs, however, argue otherwise.

²¹⁸ Third Amended Complaint, *supra* note 1, at 30.

²¹⁹ See *supra* notes 115–119 and accompanying text.

²²⁰ See *supra* notes 160–163 and accompanying text.

²²¹ CAL. EDUC. CODE §44955 (West 2011).

²²² *Butt v. State*, 842 P.2d 1240, 1249 (Cal. 1992). *Butt* only addresses the state role in fixing interdistrict disparities, and fails to address the state or local rules governing such disparities.

²²³ See *supra* notes 108–119 and accompanying text.

inction between schools that provide their students with the prevailing statewide standard education (or better) and schools in which students are more likely to receive their education from one or more grossly ineffective teachers.”²²⁴ California has no “compelling interest in creating such arbitrary distinctions” or in passing or maintaining laws which have a substantial impact on children’s fundamental right to equitable educational opportunities.²²⁵

Although overruled on procedural grounds, the trial court in *Reed* preliminarily found for the plaintiffs on the merits, finding an as-applied constitutional violation:

The Legislature clearly qualified teachers’ interest in seniority-based layoffs to accommodate constitutional equal protection interests. . . . LAUSD [cannot] bargain away students’ constitutional rights. In other words, teachers do not have a vested interest [sic] in the application of seniority in a layoff that will result in an equal protection violation and a school district does not have discretion to violate students’ fundamental right to equal educational opportunity.²²⁶

The court found no compelling state interest justifying the defendants’ conduct.²²⁷

The trial court’s holding in *Reed* applies with equal force to all states whose constitutions afford a duty to provide children with equitable or educational opportunities. While few states have “skipping” exceptions to their seniority statutes,²²⁸ the courts have the “power to override both statutory and contractual seniority rights to remedy the violation of Plaintiff’s constitutional rights.”²²⁹ Thus, even if the California legislature “contemplated” the need to skip teachers to prevent equal protection violations of students’ fundamental right to education, notwithstanding the skipping provision, the courts possess the authority to deem a statute or contract unconstitutional, as-applied or to repeal it in its entirety.

²²⁴ First Amended Complaint, *supra* note 10, at 20.

²²⁵ *Id.*

²²⁶ Revised Findings and Order, *supra* note 154, at 7.

²²⁷ *Id.*

²²⁸ The other states are Alaska, Oregon, and Tennessee. See DOWELL, ET AL., *supra* note 4, at 3.

²²⁹ Revised Findings and Order, *supra* note 154, at 8 (citing *Arthur v. Nyquist*, 712 F.2d 816, 822–23 (2d Cir. 1983) (affirming an injunction overriding statutory seniority-layoff rights to protect students’ constitutional rights); *Oliver v. Kalamazoo Bd. of Educ.*, 706 F.2d 757, 763–64 (6th Cir. 1983) (stating that the court may hold statutory seniority rights unenforceable to vindicate students’ constitutional rights); *Morgan v. O’Bryant*, 617 F.2d 23, 27–29 (1st Cir. 1982) (affirming an injunction to protect students’ constitutional rights by precluding use of a seniority-based layoff system in a collective bargaining agreement); *Bolin v. San Bernardino City Unified Sch. Dist.*, 155 Cal. App. 3d 759, 767 (Cal. Ct. App. 1984) (“The expectation of being assigned to a particular school on the basis of seniority is not a protected right. Seniority is merely an economic right which can be bargained away.”).

This ability to repeal a statute in its entirety holds true in California as well, as evidenced by the *Vergara* court's tentative decision.²³⁰ While the California courts should find at a minimum that, where budget-based layoffs disproportionately impact high-poverty and high-minority schools, skipping is allowed under section 44955(d)(2), the California Court of Appeals should go further and uphold the *Vergara* decision deeming California's LIFO statute facially unconstitutional.²³¹ California is an example of a state whose education code provides an exception to address situations where districts deviate from seniority on state constitutional grounds; yet this exception is rarely, if ever, invoked.²³² Given the disproportionate number of new teachers working in low-income and high-minority communities, school districts can easily find many reasons to use California's skipping exception; this would, however, effectively render seniority provisions obsolete in times of budget-based layoffs. Teachers unions have not allowed this to occur.²³³ The unions will not allow it to occur in the future.²³⁴ Thus, where districts, teachers unions, and legislators cannot find a middle ground to ensure the maintenance of an adequate or equitable education system, LIFO statutes should be held facially unconstitutional.

B. *California and Other States Can Find a Middle Ground to Address the Disproportion Impact of Layoffs on Poor and Minority Students*²³⁵

While courts retain power to deem LIFO statutes unconstitutional, as demonstrated by the recent *Vergara* decision,²³⁶ the need to involve courts in reform is lessened if stakeholders can find alternative ways to administer layoffs. Most states with LIFO statutes do not have skipping exceptions like California's section 44955(d)(2).²³⁷ While legislatures may attempt to amend LIFO statutes to include skipping exceptions, there are other routes to consider as well. Currently, strict applications of LIFO statutes when conducting layoffs fail to take teacher quality into account—layoffs are quality-blind.²³⁸ Quality-blind layoffs rid districts of teachers who may not only be better equipped to serve particular student populations, but purge districts of teachers who *want* to teach in these

²³⁰ Tentative Decision, *supra* note 184, at 13–14.

²³¹ *Id.* at 14.

²³² DOWELL ET AL., *supra* note 4, at 9.

²³³ See *infra* Section III.C.

²³⁴ *Id.*

²³⁵ While this subsection suggests three alternatives to a skipping exception or complete repeal of LIFO provisions, it recognizes that there are alternatives or variances to the suggestions set forth.

²³⁶ Tentative Decision, *supra* note 184, at 13–14.

²³⁷ See DOWELL ET AL., *supra* note 4, at 9.

²³⁸ Tentative Decision, *supra* note 184, at 13; NEW TEACHER PROJECT, A SMARTER TEACHER LAYOFF SYSTEM: HOW QUALITY-BASED LAYOFFS CAN HELP SCHOOLS KEEP GREAT TEACHERS IN TOUGH ECONOMIC TIMES (2010), available at http://tntp.org/assets/documents/TNTP_Smarter_Teacher_Layoffs_Mar10.pdf.

environments.²³⁹ Thus, one alternative to adhering to the use of strict seniority in layoff decisions is to amend statutes or collective bargaining agreements to weigh other factors, such as teacher quality, teacher attendance and student performance,²⁴⁰ when making layoff decisions.

After surveying teachers to come up with an alternative,²⁴¹ the New Teacher Project (TNTP) suggests one such quality-based teacher model.²⁴² TNTP created a scorecard of five factors: (1) Classroom Management Rating, (2) Attendance, (3) Performance Rating, (4) Length of Service to the District, and (5) Extra School Responsibilities.²⁴³ The first, second, third, and fifth factors would take into account a period of three years.²⁴⁴ Each factor is also weighted differently, with the greatest weight placed in the most recent year and performance evaluation category.²⁴⁵

Another, albeit less holistic, alternative to district-wide layoffs, is to make layoffs at the school-wide level. Schools would conduct layoffs based solely on years of service, but the pool of teachers taken into account is only the teaching staff at the individual school. The school district would determine what percentage of its teaching staff it needs to pink slip, and each school would be responsible for a percentage of the cut. Schools would then determine tiebreakers based on performance. While this solution would still rid schools of the newer teachers, and therefore this Note does *not* recommend this alternative ahead of more holistic alternatives, it does shield schools with larger populations of newer teachers from having their teaching staffs decimated.

²³⁹ See *infra* notes 103–108 and accompanying text.

²⁴⁰ Measured over a period of years for growth, rather than by performance within a single year.

²⁴¹ The New Teacher Project describes its methodology as based on surveys and conversations with teachers in urban Midwest school districts:

In spring 2009, TNTP conducted surveys of teachers in two large, urban school districts in the Midwest. TNTP surveyed 1,697 teachers in District A and 7,602 in District B—response rates of 75 percent and 34 percent, respectively. Both districts serve a diverse student body with at least 79 percent of students from low-income families, yet vary considerably in size. One district has an enrollment of roughly 34,000 students (District A) while the other has over 100,000 students (District B). Teachers in District A are represented by an affiliate of the National Education Association. Teachers in District B are represented by an affiliate of the American Federation of Teachers. In one of the study districts, layoffs were planned for the coming school year and had been announced at the time teachers were surveyed. Both districts use quality-blind layoff policies, basing layoff decisions within each license area strictly on seniority-years of teaching experience in the district.

NEW TEACHER PROJECT, *supra* note 238, at 11.

²⁴² *Id.*

²⁴³ *Id.* at 8–10.

²⁴⁴ To compare teachers with either one or two years of experience to teachers with three or more years of experience, the scorecard multiplies total scores by 1.5 or 1.15, respectively. *Id.*

²⁴⁵ *Id.* at 11.

Lastly, legislators can work with stakeholders to draft and pass legislation reforming the use of seniority in making staffing decisions. Illinois, Massachusetts, Michigan, and Ohio are examples of successful stakeholder collaboration to ensure that layoff decisions consider factors other than seniority.²⁴⁶ In states where stakeholders express a willingness to collaborate and compromise, they should be used as models for success. This legislative alternative, however, may not work in states where teachers unions refuse to buy into the reform debate. In the end, however—as evidence by California’s lack of application of section 44955(d)(2)—even if states can write skipping exceptions into their education statutes, repeal seniority provisions all together, or successfully amend legislation, politics can still manage to get in the way of the law. Just as states promulgate state-based social legislation based on its populus’ needs, so too must states address their educational inequities in response to their individual political climates.

C. *Legal Action is California’s Best Short-Term Remedy in a Political Climate Where Legislative Reform Has Too Many Enemies*

California’s best pathway to seniority reform is through the legal system.²⁴⁷ This holds true in any state in which the local, state or national teachers unions represent a strong lobbying force seeking to thwart legislative reform.²⁴⁸ In California, the California Teachers Association (CTA) is one of the state’s most powerful lobbyist groups.²⁴⁹ From 2000 to 2009, CTA “outpaced all other special interests, including corporate players such as . . . AT&T and the Chevron oil company,” spending more than \$211 million in political contributions and lobbying expenses.²⁵⁰ From 2009 to 2012 CTA spent approximately forty million dollars, investing \$4.7 million in then-democratic candidate for Governor Jerry Brown’s election campaign.²⁵¹ CTA’s influence over Governor Brown’s policies is readily apparent with CTA’s chief lobbyist instrumental in hashing out the details of the 2011–2012 state budget.²⁵² The *Los Angeles Times* suggests that CTA’s influence is:

[W]ritten directly into California’s Constitution. More than two decades ago, the group drafted an initiative to guarantee public schools at least 40% of the general fund and waged a successful multimillion-dollar campaign for it . . . CTA has ferociously guarded a set of hard won tenure rules and seniority protections, repeatedly beating back attempts by education groups to overturn those measures, increase teacher accountability

²⁴⁶ See *supra* notes 207–213 and accompanying text.

²⁴⁷ Mishak, *supra* note 21 at A1.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at A14.

²⁵¹ *Id.*

²⁵² *Id.*

and introduce private school vouchers. It has thwarted the agendas of governors and even President Obama, whose administration has tried and failed to enlist California in its effort to make sweeping changes in the country's education system.²⁵³

CTA and California's local unions blocked attempts to pass SB 355, a bill that would allow school districts to conduct layoffs based on performance.²⁵⁴ Disagreeing with California's attempts to reform teacher accountability, the union blocked California's chance at securing federal RTTT grant funding when it refused to sign onto the State's grant application.²⁵⁵ CTA even blocked SB 1530, a bill that would have made it easier to fire teachers in cases of sexual abuse or other "egregious" misconduct.²⁵⁶ CTA objected to giving school boards more power in the dismissal decision than permitted by the current dismissal process.²⁵⁷

The silence surrounding the recent *Vergara* decision is further evidence of CTA's deep pockets. Governor Brown, Attorney General Harris and Lieutenant Governor Gavin Newsom have all failed to comment on the historic decision.²⁵⁸ While California State Superintendent Tom Torlakson, who is up for reelection in November, did comment, his statement parallels CTA and its labor partners' viewpoint: with the CTA: "Attracting, training, and nurturing talented and dedicated educators are among the most important tasks facing every school district, tasks that require the right mix of tools, resources, and expertise. Today's ruling may inadvertently make this critical work even more challenging than it already is."²⁵⁹ As the CTA and its "allies in labor are a predominant source of money for both Gov. Brown and down-ballot Democrats in the

²⁵³ *Id.*

²⁵⁴ Fishel, *supra* note 21.

²⁵⁵ Mishak, *supra* note 21, at A14.

²⁵⁶ Christina Hoag, *Defeat of Calif. Teacher Bill Shows Union Power*, MERCURY NEWS (June 28, 2012, 1:52 PM), http://www.mercurynews.com/breaking-news/ci_20965275/defeat-calif-teac ("The bill would have truncated the [teacher dismissal] process, allowing a school board to make the final dismissal decision after a recommendation by an administrative law judge and permitted evidence more than four years old to be used. It would have allowed a teacher to retain counsel and present a defense and witnesses, request a hearing by an independent arbiter and to appeal the board's decision to a court. Union officials said the bill was changing a system that already worked. They particularly objected to the provision where the teacher would have a hearing before a single administrative law judge, whose decision would only be advisory and the school board would have the final say.").

²⁵⁷ Mishak, *supra* note 21, at A14.

²⁵⁸ Phillip Matier & Andrew Ross, *Politicians don't make a peep on teacher tenure ruling*, SFGATE (June 15, 2014), <http://www.sfgate.com/bayarea/matier-ross/article/Politicians-don-t-make-a-peep-on-teacher-tenure-5553081.php>.

²⁵⁹ Press Release, California Department of Education, State Schools Chief Tom Torlakson Issues Statement on Ruling in Vergara Lawsuit (June 10, 2014), <http://www.cde.ca.gov/nr/ne/yr14/yr14rel63.asp>.

state. . . . To speak out in favor of the decision would set off a major rift. To speak out against it would undermine their standing as education reformers.”²⁶⁰ Conversely, *retiring* Democratic Representative George Miller has come out in favor of the decision, recognizing that the evidence presented at trial supported plaintiffs’ claims of disparate impact and the need for reform.²⁶¹ These politicians who have their sights set on their political careers and who rely on the teachers unions to make those careers a reality, “don’t want to bite the hand that feeds them.”²⁶²

CTA views itself as the “co-equal fourth branch of government.”²⁶³ With its big budget and political clout, “CTA is going to be around regardless” of who is sitting in the governor’s chair or which political party runs the legislature.²⁶⁴ Thus, while CTA and the local unions remain influential, legal action remains California’s best solution to education reform. It is the duty of the courts to hand down decisions based solely on “the evidence and the law” and not the political interests of education stakeholders.²⁶⁵ The *Vergara* court upheld this duty. This reform should must continue with the affirmation of the unconstitutionality of California’s LIFO statute, setting precedent for other states courts to follow suit and hold the same their comparable LIFO statutes.

IV. CONCLUSION

Where states guarantee their children the right to equitable or adequate education opportunities, the strict applications of LIFO statutes encroach upon students’ constitutionally mandated rights. Reliance on teacher seniority systems and LIFO provisions are outdated and only widen the achievement gaps that currently exists between high-minority, low-income communities and low-minority, high-income communities. The protections afforded to more “experienced” teachers should not operate so as to disregard the guaranteed rights of our students, or the hard work of newer teachers. Teachers unions, educators, legislators and other stakeholders must recognize that the goal of teaching is to ensure that *all* students receive a quality, or even adequate, education, in order to enable them to succeed and compete in the job market. Systems that function only to hurt our students cannot achieve this goal.

All stakeholders must come to the table to reform teacher seniority and LIFO-based staffing systems. If all stakeholders cannot join in the debate and learn to compromise, the status quo will remain unchanged. Otherwise, reformers will look to the courts for answers, as California has done. While California’s choice of impact litigation may be one way to address the unconstitution-

²⁶⁰ Matier & Ross, *supra* note 258.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Mishak, *supra* note 21, at A14.

²⁶⁴ *Id.*

²⁶⁵ Tentative Decision, *supra* note 184, at 5.

ality of putting the statutory rights of teachers before the constitutional rights of our students—and if ultimately successful, set precedent for future challenges to the disproportionate provision of education opportunities amongst our students—reform efforts will be slow and grim without buy-in from all education stakeholders. At the end of the day, however, our education systems *must* put the needs of students first, and whatever method is utilized to improve the broken seniority systems is a necessary step to ensure the attainment of adequacy or equity that states promise our children.

